IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 249

EMMA A. OUERBACKER
Petitioner

v.

HENDERSON COUNTY, N. C., BANKRUPT
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH DISTRICT

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PLAINDEALER PRINTING CO., HENDERSONVILLE, N. C.

INDEX

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent, Henderson County, contends that there was no error in the interlocutory decree of the District Court nor in the opinion of the Circuit Court of Appeals in affirming the said decree.

STATEMENT OF FACTS

The essential facts necessary for an understanding of this case are carefully and concisely set out in the opinion of the Circuit Court of Appeals (R. 83-87) and for this brief

the respondent adopts the statement of facts in the opinion as its own.

ARGUMENT

The numerous "questions presented" in the petition beginning on page 5 are not in any logical or coherent order; but, nevertheless, for convenience sake they will be taken up in this argument in the same order as presented in the petition.

FIRST QUESTION

Appellant contends that the District Court erred in authorizing exchange of bonds prior to the hearing on the merits of the case. If this was error it was harmless, being without prejudice to the petitioner, the appellant, or other creditors. Two plans of refinancing were submitted as one plan of composition. The first plan is dated 1936; the second plan 1940. Prior to the filing of the petition 98% of the creditors, or all who could be found except this appellant, had agreed to the 1936 plan, and this plan had been in operation for four years until the County realized its inability to continue to meet the plan. In 1940 a supplemental plan was offered. And when the petition was filed more than 66 2/3 per cent of the petitioner's creditors had filed their bonds with the designated depository, viz., the State Treasurer, for exchange, and had also signed written acceptances of the plan, and a considerable sum of these bonds had been exchanged. Many of the bondholders, after the filing of the petition, desired to exchange their bonds without waiting for the confirmation of the plan of composition by the Court. The fact that the exchanges were made with the consent of the County and the bondholders, which was approved by the trial Judge, could in no sense and by no stretch of the imagination prejudice the appellant.

The order did not require any bondholder to exchange his bonds, it simply permitted him to do so.

Under Chapter 9 of the Bankruptcy Act as amended, it is clear that a plan of composition may consist of a previous refunding plan or plans where the bonds had already been exchanged before the filing of the petition for composition of debt. (Bankruptcy Act Sec. 83 [j]).

SECOND QUESTION

Here appellant contends the Court erred in approving the petition for composition of debt, in that creditors who owned 51 per cent of the securities had not accepted the plan. As stated heretofore, 98 per cent of the bonds had been exchanged under the 1936 plan of refinancing, and a considerable sum under the 1940 plan, prior to the filing of the petition. Written assents to each plan, which included a substantial majority of the creditors, accompanied the delivery of the bonds for exchange to the State Treasurer. The accompanying assents did not refer to "a plan of composition." They did refer to "a plan of refinancing." The difference would seem to be tweedle dum or tweedle dee. They were agreeing to the offer made by the County to refinance its debts. At the time the petition was filed, the percentage of acceptances, in writing, amounted to more than 98 per cent of the 1936 plan, and more than 66 2/3 per cent of the 1940 supplemental plan.

When the hearing on the petition for composition of debt came before the District Court on September 4, 1941, 95 per cent, or more, of the County's creditors had formally accepted the plan of composition, in writing, and these acceptances were offered in Court. No point was made concerning an insufficient number of acceptances to the plans of refinancing or the plan of composition. The appellant raised the question first in the Court of Appeals. To this procedure the Appellate Court replied that the appellant waived this objection, if in fact it ever had foundation and if the facts should have war-

ranted a dismissal for this reason, the Court could have permitted a refiling of the petition which would have met the objection made.

We direct attention to the Court of the fact that this proceeding is of equitable nature whereby the Court looks to the justice of the cause, rather than the technical objections which undertook to destroy rights. The whole purpose of the Bankruptcy Act as it relates to municipalities was to afford them relief in Courts of equity, so that the public might not be burdened extremely by those who seek to exact the last "pound of flesh." Does it not appeal to the conscience of the Court that the petition has merit, since now, as disclosed by the record, of all the County's creditors the sole objector is the appellant herein? To permit a single objector, holding a fractional part of the bonds, to upset this plan of refinancing, would nullify the spirit and purpose of the Bankruptcy Act as administered by the Courts of equity. As evidence of the harsh rule sought to be applied by the appellant, the record discloses she declined to accept the 1936 plan, and after waiting more than four years, declined to accept a supplemental plan thereto. She demands the fulfillment of her contract to the letter, irrespective of the injury to the public. Apparently, she would destroy a municipality as a governmental unit and all its governmental functions, rather than accede to the reduction of a small amount of her interest.

In Kelley, et al, vs. Everglade Drainage Dist., 127 F. 2d 808, a part of the required 51 per cent of acceptances came from a Bondholders Protective Committee. This committee had owned some of the bonds less than thirty days, and under the state law it was necessary to give thirty days' notice before sale could be completed. The Bondholders' Committee, therefore, did not have complete title to the bonds at the time the acceptances were executed. The Court held that since it did not appear that any of the bondholders who were selling

their bonds to the Committee objected to the plan, the acceptances were technically illegal, yet the Circuit Court of Appeals held that this was not sufficient grounds for dismissal, especially in view of the fact that 99 per cent of the creditors had accepted the plan.

Extreme technicalities are never sanctioned by Courts of equity, especially when no damage is done.

THIRD QUESTION

Appellant contends that the District Court erred in finding and holding that Henderson County was insolvent or unable to meet its debts as they matured. There was ample evidence for this finding and none to the contrary. D. G. Wilkie, Chairman of the Board of Commissioners; George H. Adams, Chief Refinancing Division, Local Government Commission of the State of North Carolina; W. Kelvin Gray, President, Municipal Council, Inc., all testified to the absolute inability of the County to meet its obligations as they would mature and as they had matured. Reasons were given to support their conclusions. The witness Adams (Page 67 of the Record) stated that he had made a survey of the financial conditions of the County, at the request of the County officials, and definitely recommended the adoption of the plan of composition and the plans of refinancing submitted to the creditors prior thereto.

The Local Government Commission of North Carolina is, by virtue of State Statute, supervisor of the finances of counties and towns. Its investigation and conclusion that the County must have relief should be seriously considered by the Court as a reason for approving the plan of composition.

Counsel for appellant challenges this finding on the part of the trial Judge and the approval thereof by the Court of Appeals without pretense of reason, except to say that the

judgment and findings of the trial Judge were substantially according to the testimony and followed the testimony in its findings. This is as it should have been. In fact, we believe appellant's counsel concede the merit of the finding on the part of the Court of the inability of the County to meet its obligations as they matured by the following excerpt taken from their Brief:

> (Appellant's Brief, page 10) "The 1936 plan and the 1940 plan were sponsored by the same groups, and it may be assumed that the representatives of the creditors and the County carefully surveyed the County valuations and assessments and potential tax rates before recommending each of those plans."

Of course, the state officials and county officials, as required by law, did "carefully survey the County valuations and assessments and potential tax rates before recommending each of those plans." That was the reason for recommending the plans. The facts corroborated their investigation and appraisal of the ability of the County to meet its obligations, and the Court so found.

On Page 12 of Appellant's Brief, counsel contends that the record is silent as to the disposition of tax revenue and general income of the County.

The trial Judge in the District Court authorized appellant's counsel to go to the records of the County and thoroughly investigate the condition of the County, or in lieu thereof, submit questions to be answered, which would disclose the County's financial condition and the disposition of revenues, and counsel accepted the latter and prepared questions which were answered and introduced in evidence by appellant's counsel. These answers were not challenged. They have not been challenged to this date, except by inference in their present Brief. At this late date surely they should not complain when the door was so wide open for them in the beginning. The

County cooperated and extended them every courtesy and answered every question asked and furnished additional information which disclosed the full financial status of the County.

Then also we might say by way of reiteration, if the plan of composition is so unjust to the creditors surely its injustices could be discovered by more than one fractional creditor. Human mind is such that it can argue on either side of any question, whether supported by facts or not, and in this case the imagination of the appellant that she is being unfairly treated seems to arise only because of her ability to imagine.

In Taylor vs. Provident Irr. Dist., 123 F. 2d. 965, it was contended that the record failed to disclose sufficient valuation data to enable the trial Court to reach a conclusion as to the fairness of the plan. The Court of Appeals, Ninth Circuit, held that the evidence was adequate and sufficient. Taylor filed a petition in this Court for writ of certiorari, which was denied, 86 U. S. L. ed. 811 (Advance Sheets). In Lorber vs. Vista Irr. Dist., 127 F. 2nd 628, and in other cases, the Circuit Court of Appeals, Ninth Circuit, stated the test "as to the fairness of the plan to be whether or not the amount to be received by the bondholders is all they can reasonably expect under the circumstances." Whether a taxing unit is solvent is a difficult question. The assets of the taxing unit consist only of the indefinite power to levy and collect taxes. Neither a county nor a city has unlimited taxing power. Faitoute Iron and Steel Co. vs. Asbury Park, 86 U. S. L. ed. 1108 (Advance Sheets).

FOURTH QUESTION

Appellant undertakes to present two questions here. First, that the Court did not recognize petitioner's judgment. This question was not raised in the District Court, nor in the Circuit Court of Appeals. It cannot now be held for error. However, the question is conclusively settled against the appellant in

Section 83 (b) of the Bankruptcy Act, which provides in part: "That the holders of all claims, regardless of the manner in which they are evidenced, which are payable without preference out of funds derived from the same source or sources, shall be of one class." This is exactly the manner in which the Court recognized plaintiff's judgment. The judgment was based upon coupons, and all persons holding coupons were dealt with alike. In other words, "the manner in which they are evidenced" is taken to mean that the claim of the appellant is based upon coupons, but because of default it is evidenced by judgment. Whether it be considered evidenced by judgment or coupons, both are payable "without preference out of funds derived from the same source."

Petitioner cites Section 63 (a) of the Bankruptcy Act, but that applies to general bankruptcies only. The law under which we are proceeding is known as the Municipal Bankruptcy Act, being Chapter 9 of the Bankruptcy Act, Sec. 81-83.

There is a recent decision of Circuit Court of Appeals, Fifth Circuit, bearing on this matter, Texas Agr. Ass'n. vs Hidalgo County, W. C. & Imp. Dist. No. 1, 125 F. 2d. 829. In that case one creditor obtained the regular cash distribution which was raised by a loan from the Reconstruction Finance Corporation, the same as other creditors, and in addition, obtained a note from the Imp. Dist. for the balance of the claim. The note was held invalid on the ground that it increased the public debt without the required vote of the taxpayers in the Imp. Dist. as required by law, yet it is indicated very clearly that the Court regarded the effort of the creditor to collect the note as being a preference over other creditors and held "There is no equity in the claim that would warrant a departure from the settled rule of the law in Texas."

Appellant contends there were two plans of composition. This is without foundation. The statement of appellant (Peti-

tion, Page 15) that "The Court must have granted a hearing on both plans which it utterly failed to do" is flatly contradicted by the record. Both plans were attached to and made the plan of composition. In fact, there was but one plan. The 1936 plan was supplemented by the 1940 plan. The evidence referred to had to do with the indebtedness of the County in 1936, the expenses of the 1936 refunding plan, reasons for modification of the 1936 refunding plan as submitted in the 1940 supplement. Appellant's thirty-nine questions and answers (R. 33-46) had to do with the County's finances under the 1936 plan and the supplement of 1940.

FIFTH QUESTION

Here, again, there are two questions. The first is that there was error because the petitioner was required to make a greater concession of interest than others. In Taylor vs. Provident Irr. Dist., (U. S. C. A. Ninth Circuit), 123 F. 2d 965, Taylor, who opposed the refunding plan, contended that his bonds should be paid in full under the plan of composition in which the creditors of the Irr. Dist. would receive 20 cents for each dollar of the principal amount of their bonds, because his bonds were the only ones outstanding of the same issue, all other bonds of the same issue having been paid in full and bonds maturing later than his having been paid in full. His bonds had not been paid, on the mistaken assumption that they were outlawed. The Court held: "The Bankruptcy Act places on a basis of equality all existent creditors whose claims are payable from the same source, and in event of bankruptcy the bonds of the District of whatever maturity and whether they have been registered or not are a parity." As stated above, Taylor filed petition in this Court for writ of certiorari, which was denied, 86 U. S. L. ed. 811. In another Circuit Court of Appeals case, Ninth Circuit, McDonald, et al, v. Carbona Irr. Dist., 123 F. 2d 869, McDonald contended that the plan

of composition was unfair because it made no provision for payment of interest either on bonds or warrants accruing after a certain date, while bond interest coupons maturing on or before that date were to be taken care of in full. The Court held against him. McDonald also petitioned this Court for writ of certiorari, which was also denied, 86 U. S. L. ed. 868.

The second question embodied in petitioner's fifth question, is on the matter of the failure to include the School District bonds. The explanation is that the holders of the School District bonds, even though the County assumed their payment, can continue to hold the School Districts on their bonds; that is, the holders of the School District bonds can look to two sources for the payment of their bonds, the County and the School District. Therefore, such bonds do not come in the same classification as the general obligations of the county.

Petitioner contends that the 1936 refunding plan was in default in 1940 because the County assumed the School District indebtedness. Now, as a matter of fact, the County was in default July 1, 1940, regardless of the School District bonds. The fact that the County was going to have to take over the payment of the School District bonds was a further and compelling reason, in addition to reasons already existing, for asking creditors to accept the 1940 refunding plan.

SIXTH QUESTION

Petitioner contends that the District Court erred in finding that no fiscal agent promoting the composition was compensated by both the debtor county and its creditors and in further finding that the North Carolina Municipal Council, Inc., was not employed by the County to promote the plan of composition. As to the connection of the North Carolina Municipal Council with the plan of composition, the evidence shows clearly, and there is nothing to the contrary, that the North

Carolina Municipal Council was not employed by the County to submit the plan of composition or to obtain acceptance of creditors to the plan of composition. The North Carolina Municipal Council was employed as the County's fiscal agent to handle the 1936 and the 1940 refunding plans, as outlined in contracts between the parties and introduced in evidence. The connection of the Municipal Council with the refunding plans was fully disclosed in the District Court. Counsel for Mrs. Ouerbacker devoted a great deal of time trying to show that the North Carolina Municipal Council realized profit in the refunding plan both from creditors and the County, but counsel's efforts along this line were completely unsuccessful. Counsel for appellant called to the stand and examined the President of the North Carolina Municipal Council, Mr. W. K. Gray; disconnected portions of whose testimony are printed in the record, pages 58-62, but the name of the witness is not given nor the name of the attorney conducting the examination. Transcript of the hearing shows that Mr. Sandridge of appellant's counsel conducted the direct examination.

The District Court made findings as to the connection of the North Carolina Municipal Council with the refunding plan, its compensation, etc., and then made the further finding which is quoted on page 21 of petition. The finding quoted on page 21 of the petition is absolutely correct because the North Carolina Municipal Council was not asked to secure acceptances of creditors to the plan of composition. Of course, the plan of composition consisted of the 1936 plan and 1940 supplement, but the plan of composition itself was submitted to the creditors by Henderson County through the North Carolina Local Government Commission.

Coming directly to the question of compensation of the North Carolina Municipal Council, there is no evidence whatever that it obtained or attempted to obtain any compensation

from bondholders for handling the refunding plans as a fiscal agent of Henderson County. Counsel for appellant made a most strenuous effort to show that it did receive or might have received compensation from bondholders but failed to do so, and there is nothing in the record contrary to the findings of the Court with respect to the compensation of the North Carolina Municipal Council. It is stated in the petition, page 24, "The Council was nothing more than a Bondholders Committee acting as agent and representative of the bondholders." It certainly was not a Bondholders Committee. Any bondholder or representative of a bondholder could become a member. The membership included banks, insurance companies, and fraternal orders (R. 59). Petitioner could have become a member if she had so desired. It neither owned nor controlled any bonds.

In the Circuit Court of Appeals, Counsel for appellant in their brief and in their oral argument tried to make the facts of this case appear to be similar to the objectionable features of the Avon Park case (American United Mutual Life Insurance Co. vs. Avon Park, 311 U. S. 138, 85 L. ed. 91). There is no similarity whatever in the facts. In the Avon Park case the fiscal agent of Avon Park not only received an exhorbitant fixed compensation from Avon Park, but also received compensation from both Avon Park and its creditors and also had a speculative stake in possible price appreciation of bond coupons. Furthermore, the fiscal agent owned a large block of the Avon Park bonds which were to be counted as a part of the 51 per cent of accepting creditors. Some of the bonds had been purchased for the purpose of acquiring a sufficient number of bonds to put the plan through. Most of these facts were concealed from the bondholders by the fiscal agent. The total compensation of the North Carolina Municipal Council as set forth in the refunding plans which were submitted to bondholders amounted to approximately .6 of 1 per cent of the

total Henderson County obligations. In the Avon Park case the fiscal agent received a fixed fee of 4 per cent and the other compensations in addition. In McDonald, et al, vs. Banta Carbona Irr. Dist., 123 F. 2d. 968, the Reconstruction Finance Corporation which loaned the District money to be paid creditors in the composition plan stipulated a little more than 1 per cent for use for expenses. There is no similarity whatever between this case and the Avon Park case.

On page 27 of appellant's "supporting brief" there is a statement by appellant's counsel, as follows:

> "The Bankruptcy Court was to be the fair and impartial arbiter exercising at all times an 'informed, independent judgment.' Both the District Court and the Circuit Court of Appeals failed to perform this function in this case and approved of erroneous proceedings merely because it was represented that the majority of creditors were anxious to rush the plan through to a conclusion."

We will not assume that appellant's counsel intends any reflection by intimating that the Court was high-pressured into deciding this case erroneously because the creditors desired to bring it to a conclusion. We do not believe that the Court would commit error intentionally merely "because it was represented that the majority of the creditors were anxious to rush the plan through to a conclusion." Haste is sometimes good judgment, but we know of no reason why the Court should commit error intentionally merely because the litigants were hasty. We seriously doubt this statement on the part of appellant's counsel and challenge it as being unwarranted from all the facts.

After all, we must keep as a guiding star before us the question: Has the County offered to its creditors all that it is financially able to do within reason, under the circumstances?

Technicalities will not answer this question. The trial Judge held that the plan of composition was fair and reasonable to all the creditors alike. This holding was supported by evidence. The Circuit Court of Appeals approved the judgment of the Court below. Approximately 99 per cent of the creditors join in this approval. What more could be said in support of a plan of composition?

The decision in this case by the Circuit Court is full and complete. It answers every objection of the appellant. It meets out equity to all the creditors alike.

WHEREFORE, respondent respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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